Brylane, L.P., Employer-Petitioner and Midwest Joint Board, Union of Needletrades, Industrial and Textile Employees (UNITE), AFL-CIO-CLC. Case 25-RM-597

November 20, 2002

ORDER

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

The National Labor Relations Board has considered the Employer-Petitioner's request for review of the Regional Director's Decision and Order pertinent portions of which are attached as an appendix. The request is denied as it raises no substantial issues warranting review.

We agree with the Regional Director, for the reasons he expressed, and for the reasons set forth in *New Otani Hotel & Garden*, 331 NLRB 1078 (2000), that the Union's request for a neutrality and card check agreement did not constitute a demand for recognition within the meaning of Section 9(c)(1)(B) of the Act. Thus, contrary to our dissenting colleague, we deny review of the Regional Director's decision to dismiss the Employer's petition for an election.

MEMBER LIEBMAN, concurring.

I join Member Bartlett in denying review of the Regional Director's decision to dismiss the Employer's petition in this case. I agree that, under *New Otani Hotel & Garden*, 331 NLRB 1078 (2000), the Union's request for a neutrality and card check agreement did not constitute a demand for recognition within the meaning of Section 9(c)(1)(B) of the Act. See also the plurality opinion in *Rapera, Inc.*, 333 NLRB 1287 (2001) (opinion of Members Liebman and Walsh). My dissenting colleague, however, has made other contentions that were not raised or litigated by the parties in this case. Although it is unnecessary to rule on those contentions, I write separately in order to make the following observations:

First, based on his incorrect assumption that the Union's conduct amounts to a request for recognition by a labor organization that does not actually represent a majority of the Employer's employees, my colleague posits that such a request would be unlawful. He cites no authority for this proposition, however, and I know of none. Although acceptance of recognition by a minority union is clearly a violation of Section 8(b)(1)(A), there is no

authority for the proposition that a request for recognition by a minority union would violate the Act. See *NLRB v. Teamsters Local 639 (Curtis Bros.)*, 362 U.S. 274 (1960) (peaceful picketing by a union which does not represent a majority of employer's employees to compel immediate recognition does not violate Section 8(b)(1)(A)).

Similarly, my colleague cites no authority for his contention that the Union has violated the Act by asking the Employer to enter an agreement for neutrality and a card check, before it has actually been certified or recognized as the majority representative of the Employer's employees under Section 9(a) of the Act. The proposition that a labor organization cannot lawfully deal with an employer regarding the mechanism for demonstrating its majority status until it has actually demonstrated its majority status to the Employer's satisfaction is, at best, counterintuitive. But in any event, neither the Board nor the courts have ever held that it is per se unlawful for a union to negotiate or enter into any type of an agreement with an employer simply because, at the time of the agreement, the union does not represent the employer's employees under Section 9(a) of the Act. Cf. Retail Clerks Locals 128 and 633 v. Lion Dry Goods, Inc., 369 U.S. 17 (1962) (strike settlement agreement between employer and union which acknowledges that it does not represent employees under Section 9(a) nevertheless enforceable under Section 301 of Act).

Finally, my dissenting colleague contends that the Union's request for a neutrality and card check agreement "appears to be unlawful under Section 302 of the Labor Management Reporting and Disclosure Act, 29 USC 186," because such an agreement is a "thing of value" to the Union. Once again, my colleague cites no authority for this novel proposition. In fact, Section 302 is a criminal statute that is aimed at the ills of bribery and extortion in labor relations, and thus it would not appear

¹ Member Bartlett agrees that the request for review does not raise any issues warranting review. He does not address any additional issues raised by the dissent. Member Bartlett expresses no view on the correctness of the decision in *New Otani*. In the absence of a three-member Board majority to reconsider that decision, however, he agrees that it is controlling in this case and that review should be denied.

¹ Ladies' Garment Workers (Bernhard-Altmann Corp.) v. NLRB, 366 U.S. 731 (1961).

² Sec. 302 provides, in pertinent part, as follows:

⁽a) It shall be unlawful for any employer . . . to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

⁽¹⁾ to any representative of any of his employees who are employed in an industry affecting commerce; or

⁽²⁾ to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce . . .

⁽b) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

³ "The purpose of sec. 302 is to 'punish certain criminal activity in the conduct of union affairs, and thereby help to drive criminals from the labor movement." *Central States Southeast & Southwest Areas*

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to be concerned at all with this type of organizational activity. See *Wyman-Gordon Co. v. NLRB*, 397 F.2d 394, 396 (1st Cir. 1968), judgment reversed on other grounds, 394 U.S. 759 (1969) (court rejects employer's argument that compelling it to provide an "*Excelsior*" list of employee names and addresses would force it to provide a "thing of value" to the union in violation of Section 302). A logical extension of my colleague's argument would be to hold that when an employer extends unlawful recognition to a minority union under Section 8(a)(2), the recognition would also violate Section 302. To my knowledge, however, no court has ever held that an employer that violates Section 8(a)(2) in such a manner also commits a criminal violation of Section 302.

In any event, I prefer to address myself to the arguments that were actually presented to us by the parties, and having fully considered those arguments, I agree that we should deny review of the Regional Director's Decision and Order.

MEMBER COWEN, dissenting.

I would grant review and remand this case to the Regional Director to reinstate and process the petition.

Midwest Joint Board, Union of Needletrades, Industrial and Textile Employees (UNITE), AFL—CIO—CLC (Union) has clearly made a demand for recognition within the meaning of Section 9(c)(1)(B) of the Act by requesting that the Employer enter into a neutrality/card check agreement. By making this request, the Union seeks to determine the method by which the Employer's employees will express their choice regarding union representation. It is self-evident that such an agreement resolves a topic of great interest to those employees, and as such it would be a topic of mandatory bargaining if the employees were represented by a union.

In my view, a request by a union that seeks to deal with an employer concerning a topic that otherwise would be a topic of mandatory bargaining is, in fact, a demand for recognition within the meaning of Section 9(c)(1)(B) of the Act, at least with regard to that topic. An employer faced with such a request may either extend recognition if it is satisfied that the union actually represents a majority of its employees, or it may deny that request, or it may turn to the Board to resolve this question. The Employer here turned to the Board, and we should resolve the question through a secret-ballot election.

As an additional matter, I note that the Union here does not actually claim to be the majority representative

Pension Fund v. Kraftco, 799 F.2d 1098 (6th Cir. 1986), cert. denied 479 U.S. 1086 (1987), quoting H.R. Rep. No. 741 86th Cong. 1st Sess., reprinted in 1959 U.S. Code Cong. & Ad. News 2433. See also S. Rep. 187, 86th Cong., 1st Sess., at 13 (1959), reprinted in 1 Leg. Hist. (LMRDA 409).

of the Employer's employees. Under these circumstances, the Union's demand is actually a demand for recognition in the absence of majority status, and as such, is unlawful. Clearly, the Union has sought an agreement with the Employer regarding the Employer's employees, and it is equally clear that the Union is not currently the representative of those employees under Section 9(a) of the Act. Since only a 9(a) representative may lawfully deal with an employer concerning wages, hours or other terms or conditions of employment, the Union's request for such dealing is unlawful.

Finally, since a neutrality/card check agreement is a "thing of value" to the Union, and no exception appears to apply, its request for a neutrality/card check agreement also appears to be unlawful under Section 302 of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. 186.

For all the forgoing reasons, I would grant review and remand this case to the Regional Director to reinstate and process the petition.

My concurring colleague says that a *request* for recognition by a minority union would not violate the Act. Accepting that proposition arguendo, it does not aid my colleague's position. My point is *not* that the union request for recognition was unlawful. Rather, my point is that there was in fact a request for recognition, and thus the RM should be processed.

My colleague acknowledges that a *grant* of recognition to a minority union would be unlawful. Thus, the Board has two choices in this case. It can dismiss the RM petition and permit minority recognition to occur. Or, it can process the RM petition, hold a democratic election and thereby avoid minority recognition. I would adopt the latter course.

My colleague also asserts that an *agreement* between an employer and a minority union is lawful. She cites *Retail Clerks Locals 128 and 633 v. Lion Dry Goods*, 369 U.S. 17 (1962), for this proposition. However, the Court there dealt only with a Section 301 case. It did not have before it the issue in the instant case. Indeed, the Court expressly declared:

This issue does not touch upon whether minority unions may demand that employers enter into particular kinds of contracts or the circumstances under which employers may accord recognition to unions as exclusive bargaining agents.

Thus, *Lion Dry Goods* is a far cry from a holding that a grant of recognition to a minority union would be lawful under Section 8(a)(2). Indeed, as discussed above, my colleague agrees that such conduct would violate Section 8(a)(2).

Finally, with respect to Section 302, I recognize that the Board does not have a 302 allegation before it. However, I believe that the Board must be keenly aware of the implications of its actions. As the Supreme Court has repeatedly reminded us, the Board cannot ignore the broader policies of our nation's laws. One of those policies concerns the evil of an employer's grant of a "thing of value" to a union. Without passing on whether the agreement sought here would constitute a violation of Section 302, my point is simply that the processing of the RM petition would avoid a potential 302 violation.

APPENDIX

REGIONAL DIRECTOR'S DECISION AND ORDER

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I. THE ISSUES

The Petitioner Brylane, L.P. seeks an election within a multifacility unit comprised of distribution workers employed at its two Plainfield, Indiana distribution centers and its Indianapolis, Indiana distribution center. It is the position of the labor organization involved herein, Midwest Joint Board, Union of Needletrades, Industrial and Textile Employees (UNITE), AFL—CIO, CLC, that the petition should be dismissed on grounds that no question concerning representation exists. However, in the event it is determined that a question of representation exists, the Union agrees that the multifacility unit for which the Employer has petitioned, is an appropriate one for purposes of collective bargaining, and it is willing to proceed to an election within that unit.

II. DECISION

For the reasons discussed below, it is concluded that at no time since the inception of its organizational campaign among the Indiana employees of Brylane has UNITE made a request, demand or "claim" for recognition within the meaning of Section 9(c)(1)(B) of the Act, 29 U.S.C. § 159(c)(1)(B). Since no question concerning representation exists, the present petition shall be dismissed.

III. STATEMENT OF FACTS

Brylane markets and distributes retail apparel and home furnishings through nine catalogs and a website. Brylane is head-quartered in New York City and operates facilities in Massachusetts, Texas, and three facilities in Indiana, which are the subject of the instant dispute. Brylane is a subsidiary of the French company, Pinault-Printemps-Redoute (PPR). The Indiana facilities receive apparel and household furnishings from vendors; warehouse the items as inventory, then process and fill customer orders received from the retail public. Approximately

740 distribution employees are currently employed within the petitioned unit.

UNITE began its organizational campaign among employees at Brylane's Plainfield and Indiana distribution centers in October 2001. UNITE's campaign has been multifaceted. UNITE solicited employees to sign cards authorizing the Union to represent them; distributed handbills to employees extolling the virtues of unionization; and held meetings for employees. On June 25, 2002, UNITE sponsored a rally in Indianapolis at which AFL-CIO Secretary-Treasurer Richard Trumpka addressed an assembled group of Brylane employees. There was also reportedly a rally in front of the building occupied by Brylane's law firm in Indianapolis, and a rally in front of Brylane's corporate office in New York City. On an unknown date(s) union members and allies distributed leaflets at Gucci stores which discussed the Brylane campaign and PPR's alleged opposition to employees' rights to organize.³ Handbills were also distributed to consumers in front of a Sears store in Indianapolis, seeking public support for the employees' campaign. The Union also mobilized sympathetic members of the local community who authored a letter to Brylane which expressed concern regarding the strategy Brylane had adopted in response to the campaign. In July 2002, UNITE also registered a complaint with the U.S. Department of State asserting that Brylane and its parent company had engaged in serious violations of the Organization for Economic Cooperation and Development Guidelines for Multinational Enterprises. Several unfair labor practice charges were also filed by the Union and/or employees with Region 25 of the Board, alleging that Brylane had violated the Act, but all charges were dismissed or withdrawn.

During two telephone calls in mid-October to Brylane's chairman and chief executive officer, Russell Stravitz, the Union's New England director/international vice president Warren Pepicelli, informed Stravitz of the advent of the Union's campaign among its Indiana workers; asked that the Company become party to a neutrality⁴ agreement; asked that it agree upon a card-check procedure; and explained the process. Stravitz declined both requests. The Union proceeded with its organizational campaign, and as early as November 2001⁵ it made statements to Brylane employees, the press and members of the public, that a majority of employees had executed authorization cards.

At the Union's request, a meeting occurred on August 1, 2002, in New York City among representatives of the parties.

¹ Hoffman Plastic Compounds, 535 U.S. 137 (2002); Southern Steamship, 316 U.S. 31 (1942).

² I recognize that the giving of an *Excelsior* list is not a "thing of value" within the meaning of Sec. 302. However, a grant of recognition is more valuable and thus may well be a "thing of value."

³ Gucci is also a subsidiary of PPR.

⁴ A neutrality agreement is one whereby an employer agrees that during a union's organizational campaign, it will remain neutral and not express opposition to its employees' selection of union representation. According to the vice president, the card-check procedure he envisioned would involve a neutral third party who would verify the authenticity of cards presented by the Union, and if a majority of an Employer's employees executed cards, the Employer would recognize the Union as the exclusive representative of its employees.

⁵ The earliest evidence of record of such a claim of majority status occurred in a leaflet distributed to employees on approximately November 1, 2002. In addition to announcing the date of a meeting for employees, the leaflet states "Over the last few weeks, an [sic]majority of Brylane workers have signed union cards!"

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In correspondence between the parties which preceded the meeting, the Union indicated the purpose of the meeting was to discuss "Brylane's and the union's conduct during the course of the campaign and dispute resolution options concerning union representation." Present on behalf of Brylane were CEO Stravitz, Alain Luchez, the senior vice president of the catalog division of PPR (called "Redcats"), and Brylane's senior vice president of human resources, Audry Wathen. Present on behalf of UNITE were its President Bruce Raynor, its New England Director/Vice President (Warren Pepicelli), and another vice president, Mark Fleischman. The parties' two principals, Raynor and Stravitz, were the primary spokesmen. With few exceptions, the parties' descriptions of the content of this meeting are consistent. Following introductions by the participants, Stravitz asked Raynor to state the reason he requested the meeting. Raynor gave a fairly lengthy description of the history of its organizing efforts at Brylane's Indiana centers and expressed criticism of the Company's campaign strategy. He stated that the Company had conducted a campaign of intimidation and threats directed toward employees, as well as attacks upon union leadership. Raynor further stated that in light of the coercive atmosphere Brylane had created, the Union had concluded that a free and fair election could not occur at this time. Consequently, the Union believed that a neutrality agreement with a card-check procedure was the only way a representation question could accurately reflect true employee sentiments. At one point during the meeting CEO Stravitz asked Raynor what unit the Union "was interested in," and Raynor replied that the Union sought a unit comprised of employees of the three Indiana facilities. Following the Union's presentation, Stravitz presented his reply. He stated that there were employees at its Indiana centers who did not want union representation as well as those who did, and he preferred to resolve the matter through Board election procedures. Pepicelli commented that Brylane enjoyed an amicable relationship with the Union in its representation of Brylane employees at its Massachusetts distribution center, and he did not understand why Brylane would not agree to the card check procedure for Indiana workers. The meeting apparently ended on a amicable note, but without achieving a consensus between the parties.

The parties' version of the content of this meeting differs in one respect: The Employer asserts that Raynor stated that a majority of employees had signed union authorization cards, while the Union denies any such thing was said. Brylane's vice president of human resources testified as follows:

Mr. Raynor said that he has the cards. He has prepared [sic] the majority of the cards and he is prepared to prove it.

Later, on cross-examination she testified that "[h]e said UNITE has the majority of the cards and I am prepared to prove it."

Both Raynor and Pepicelli denied that these statements (or any similar statements) attributed to Raynor were spoken. Although CEO Stravitz was present at the hearing herein and available as a rebuttal witness, he was not called as a witness by either party.⁶

It is undisputed that at no time during this meeting did the Union expressly request recognition. Nor did it suggest a date on which a new card check could occur. It did not offer the name of an individual who might conduct a card check. It did not offer to show authorization cards to Brylane, and it did not ask Brylane for a list of employees.

On August 8 a second meeting occurred at the Union's request between Stravitz and Raynor.7 According to the uncontradicted testimony of Raynor, Stravitz "expressed concern about the nature of the cards that were signed." UNITE proposed that the parties agree upon a card-check procedure which would disregard existing cards; entail a new, 30-day period during which Brylane would provide UNITE with a list of employees within the petitioned unit; the Union would solicit signatures on new authorization cards; and Brylane would refrain from expressing any views or engaging in any conduct antithetical to the Union's campaign. At the conclusion of this period, if a majority of employees had executed cards, the Union could request a third party to review the cards; and if a majority of signatures were authenticated, recognition from Brylane would follow. After the Union proposed this new solicitation process at the August 8 meeting, Stravitz reiterated his preference for a Board-conducted election, and the meeting ended inconclusively.

Later that day in a telephone call to Raynor, Stravitz reiterated that he was opposed to the card-check mechanism, but would not "close the door completely" to the concept. That same day the instant petition was filed.

IV. ANALYSIS

Section 9(c)(1)(B) of the National Labor Relations Act provides in pertinent part, that when a petition has been filed:

by an employer alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section

the Board shall conduct an investigation, 29 U.S.C. § 159(c)(1)(B). If the investigation (and/or subsequent hearing) indicates that a question of representation exists, an election is conducted. The Board has consistently construed the language of this section to require evidence of a "present demand for recognition" from a union in order to process a petition under Section 9(c)(1)(B), New Otani Hotel & Garden, 331 NLRB [1078] (2000); Windee's Metal Industries, 309 NLRB 1074 (1992); Albuquerque Insulation Contractor, 256 NLRB 61 (1981). This interpretation is based not only upon the plain language of Section 9(c)(1)(B), but also its legislative history. Congress included the language limiting employer petitions to cases in which a union has presented a "claim to be recognized as the representative defined in section 9(a)" in order to preclude employers from attempting to control the timing of elections. Otherwise employers might file petitions early in organizational campaigns in an effort to obtain a vote rejecting the union before the union has had a reasonable opportunity to organize. Pursuant to the language of Section 9(c)(1)(B), employers can petition for an elec-

⁶ Brylane's CEO appeared under subpoena from UNITE.

⁷ This meeting, too, apparently occurred in New York City.

tion only after a union has sought recognition as the majority representative of its employees.

In the case at hand, it is undisputed that at no time has the Union made an express request upon Brylane that it recognize UNITE as the exclusive collective-bargaining representative of any of the Company's Indiana distribution center employees.

The Employer argues, however, that a statement made by UNITE's president at the August 1 meeting which indicated that the Union enjoys majority support among unit members, constitutes a request for recognition. This argument is rejected for several reasons. In an RM proceeding, the burden is upon the Employer to establish that a request for recognition has been made. At the hearing of this case, Brylane presented one witness who in less-than-lucid testimony asserted that Raynor stated that the Union possessed majority support among Brylane employees and was prepared to prove it. Two witnesses presented by the Union, including the person to whom this statement was attributed, denied any such statement was made. The Employer had within its power the ability to rebut this testimony by calling Stravitz as a witness since he also attended this meeting. But it declined to do so. Therefore, the preponderance of record evidence fails to establish that the statement of majority support attributed to Raynor was spoken. Even if the statement were said, a statement that a union enjoys majority status, without more, does not constitute a demand for recognition. It is undisputed that no date for a card check was proposed by the Union; it did not offer to show the Employer any cards; it did not suggest the name of an individual who might conduct a card check; and the Union did not ask Brylane for a list of employees. The undersigned is aware of no case in which the Board has held that a mere statement of majority status, whether spoken to an employer or to third parties, constitutes a request for recognition.

In its posthearing brief Brylane cites three cases which it claims stand for this proposition: *Amperex Electronic Corp.*, 109 NLRB 353 (1954), *Westinghouse Electric Corp.*, 129 NLRB 846 (1960), and *Sonic Knitting Industries*, 228 NLRB 1319 (1977). The Employer's reliance upon these cases is misplaced, for none of them involve a situation where a union made a statement claiming majority employee support. In *Amperex* the Board dismissed an RM petition for an election within a unit comprised of laboratory technicians. The Union contended that the technicians were already a part of the pro-

duction and maintenance unit it represented, and argued that the parties' contract barred further processing of the petition. The Board concluded that the laboratory technicians were not members of the existing unit and dismissed the petition not on contract bar grounds, but on grounds that no union had made a demand for recognition among a unit comprised only of technicians. Absent a question concerning representation, no election was warranted. In Westinghouse Electric Corp., the employer filed an RM petition to give its professional employees an opportunity to vote on whether they wished to continue to be included within a broader nonprofessional unit of employees. The Board found that since the union persisted in its claim to represent the professional employees in the existing broader unit, a "claim" for recognition existed, and an election was ordered. Lastly, in Sonic Knitting the employer had voluntarily recognized the union as the representatives of its employees at two locations. The employer filed an RM petition seeking an election for the employees of only one of the facilities. The Board dismissed the petition because the union claimed it represented the employees of both facilities, and it "has made no demand for recognition in the petitioned-for unit." Thus, unlike the case at hand, none of these cases involved a statement by a union indicating that it possessed support from a majority of an employer's employees. Brylane's reliance upon some of the dicta in these cases is misplaced. In one part of its decision in Sonic Knitting, for example, the Board summarizes the requisites of Section 9(c)(1)(B) by stating that a QCR is established only by the "claim" of a union "that it represents a majority of the employees." Yet in another portion of the decision, the Board explains that it is dismissing the employer's petition because "the Union has made no demand for recognition in the petitioned-for unit." Thus, the Board refers interchangeably to both a "claim" made by a union and a demand for recognition. However, nowhere does the decision hold that a union's mere statement that it enjoys majority employee support constitutes a "claim" for recognition within the meaning of Section 9(c)(1)(B).

Brylane also argues that statements made by the Union throughout its organizational campaign to third parties to the effect that it enjoys majority status, coupled with a request that Brylane sign a neutrality/card check agreement, constitute a demand for recognition upon Brylane. The Employer cites no case law in support of this proposition, however. And the undersigned is aware of none. Even in *Rapera, Inc.*, 333 NLRB 1287 (2001), Members Truesdale and Hurtgen did not consider statements of majority status made to third parties in the context of a neutrality/card-check request, sufficiently reliable evidence upon which to base a finding that a demand for recog-

⁸ In its posthearing brief the Employer mischaracterizes the record in this matter regarding certain statements made by Raynor at this meeting. The Employer argues that the Union stated that it had totally discounted an election as a vehicle for the resolution of their dispute. If voluntary recognition is the only solution to the dispute, the argument goes, then a request for a card check coupled with a claim of majority status is tantamount to a demand for recognition. The record testimony does not support the Employer's version of this conversation. Based upon record testimony, at no time—not at the August 1 meeting or otherwise—has the Union said it would not seek an election under any circumstances, Rather, Raynor explained at the meeting that it was the Union's opinion that Brylane's conduct in response to its campaign had so intimidated employees, that a free and fair election could not occur at this time. Thus, based upon record evidence, an election remains a viable option to the Union at some future date.

⁹ The Employer placed various documents into the record (some of which were authored by the Union and some of which were not), as evidence of the Union's claim for recognition. For purposes of the analysis of this argument, only those documents which were authored by UNITE and/or agents thereof, or which are otherwise attributable to Union have been considered. These include E. Exhs. 1, 2, 4, 5, 6, 7, 8, 11, and 13 (and its accompanying stipulation of the parties). Other documents are deemed of no evidentiary value since no agency relationship has been established between the author of the documents or assertions contained therein, and UNITE.

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nition had occurred. Like the case at hand, in *Rapera* the union made statements in letters to specific individuals, as well as in campaign fliers and newspaper articles, that it enjoyed the support of a majority of the employees in the petitioned unit. Members Truesdale and Hurtgen did not rely upon these statements to third parties as evidence of demand for recognition. Rather, they regarded an affidavit of a union official indicating that the union enjoyed majority support, which had been filed in United States District Court in an unrelated matter, as reliable evidence upon which to find that a demand had occurred. Moreover, Members Truesdale and Hurtgen expressed their concurrence with case precedent which requires that a demand must be made directly upon the employer. ¹⁰ Therefore, even under the Truesdale/Hurtgen analysis, no demand for recognition would be found in this case.

In Rapera all members of the Board acknowledged that statements of majority status made to third parties during a campaign, coupled with a neutrality/card-check request, do not constitute a demand for recognition upon an employer. They also recognized that often statements made by both parties during a campaign, including statements boasting of employee support, may be mere "puffery," Id. at [1288]. In other contexts, too, the Board has recognized that during an organizational campaign both parties are prone to exaggeration, and the Board no longer recognizes a claim of misrepresentation as objectionable conduct warranting the setting aside of an election, Midland National Life Insurance Co., 263 NLRB 127 (1982) (readopting the principals of Shopping Kart Food Market. 228 NLRB 1311 (1977)). As the Board stated in Shopping Kart: "... we believe that Board rules in this area must be based on a view of employees as mature individuals who are capable of recognizing campaign propaganda for what it is and discounting. Id. at 1313.

In the present case, public statements of majority support made by UNITE suggest that it, too, may have engaged in a fair amount of puffery. In a handbill distributed to Brylane employees only a month after the advent of its campaign, UNITE boasted that "[o]ver the last few weeks, an [sic] strong majority of Brylane workers have signed union cards!" (emphasis added). While it is possible that the Union obtained signed cards from over 370 employees within a few weeks' time, it is equally possible that the handbill was infected with a bit of puffery. On balance, therefore, one cannot conclude that statements made to third parties indicating that UNITE enjoyed majority support, coupled with a request that Brylane agree to a neutrality agreement and card check procedure, are tantamount to a demand for recognition upon Brylane.

In contrast to these statements of majority status, Brylane asserts that one statement contained in a newspaper article (entitled "Indy Info") authored by a UNITE organizer constitutes a present demand for recognition upon Brylane. ¹¹ The article begins with a report on a demonstration in front of a Sears store

in Indianapolis seeking public support for Brylane employees' organizational efforts. This is followed by a description of the "unjust" terms and conditions of employment under which Brylane employees work, and their need for representation. The article proceeds with an assessment of the improvements which can be expected from the collective-bargaining process. It further points out that Brylane is the only distribution center owned by PPR which is not unionized. Lastly, the article discusses forms of support Brylane employees have received from around the country, including the distribution of leaflets to customers of Gucci in Chicago and Sears in Indianapolis, and the visits from workers from Chadwick's of Boston and from France who supported the campaign. Lastly, the article states:

Brylane has been called upon to answer to their employees' demands and negotiate a contract with them. The workers will not let Brylane stand in their way as they exercise their legal rights to organize the workplace.

Viewed in the context of the article, it cannot be concluded that this one statement constitutes a demand for recognition directed by UNITE to Brylane. First, the article is written from the perspective of Brylane employees. It is they who are asking that Brylane respect their right to organize. It is their demands for which the employees seek redress, and it is they who urge Brylane to negotiate with them. The phrase "employee demands" is also ambiguous and open to several interpretations. For these reasons it cannot be concluded that this sentence constitutes a "claim" for recognition under Section 9(c)(1)(B).

Lastly, Brylane argues that the content of literature authored by UNITE during its campaign "are at least worthy of treatment no different than that given to informational picketing, because they are designed to communicate the Union's position, beliefs or assertions to third parties." It is true that at times picketing which appears at first blush to be informational or area standards in character may, upon closer examination, be found to have a recognitional object. Here, however, the issue is not whether the Union's campaign had a recognitional object—all campaigns do—but rather, whether the Union has made a *present* demand for recognition upon Brylane. Thus, the picketing analogy proposed by the Employer is inapplicable.

The facts in *New Otani Hotel & Garden*, 331 NLRB 1078 (2000), appear most analogous to the facts in the case at hand. There, the Board affirmed a Regional Director's dismissal of an RM petition on grounds that no request for recognition had been made upon the employer. In *New Otani* the union had engaged in informational picketing and urged a boycott of the employer's hotel for 4 years. Like the case at hand, it too had requested that the employer enter into a neutrality/card-check agreement. The Board rejected the employer's assertion that picket signs which said that the hotel "does not have a contract" with the union and "has substandard working conditions" constitute a demand for recognition. The Board reiterated the rationale for 9(c)(1)(B)'s enactment:

¹⁰ In *Rapera* Truesdale and Hurtgen found this direct connection to the employer through an inference that "[i]t was reasonably foreseeable that the Union's sworn court statement . . . would become known to the Employer, Id. at [1288] fn. 8.

¹¹ This document is E. Exh. 8.

Thus, the Act contemplates that a union which is not presently majority representative may decide when or whether to test its strength in an election by its decision as to when or whether to request recognition or itself petition for an election, Id. at [1288].

So, here, too, absent a "present demand" for recognition by UNITE, it is the Union's prerogative to decide when and whether to test its strength in an election or otherwise.

. . . .